tractors. The doctrine then is a very limited one, and seemingly of uncertain future.

It is suggested that in our consideration of it, we should do well to disabuse ourselves of the idea that it is based on a fiction, and that if we are tempted to regard it as inapt in these modern days, because speed and ease of communication, in lessening the differences in fact between land and water transportation, have lessened the reason for different rules of law, we should also remember that the power of vessels to cause crushing damage to other craft in the fairways of the ocean has enormously increased.

A. T. W.

ADMIRALTY: POWER OF THE STATES AND OF CONGRESS IN RESPECT THERETO.—To what extent a state may legislate on matters falling within the maritime law is still an open question, notwithstanding that the Constitution vests in the Supreme Court and inferior federal courts "all cases of admiralty and maritime jurisdiction"[1] and in the same courts by act of Congress "all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it."[2]

The last case in which the Supreme Court has had occasion to deal with this question is *Union Fish Co. v. Errickson.*[3] Errickson libelled a schooner belonging to the Fish Company for breach of a maritime contract, made orally in California, whereby he had contracted to serve as master of the vessel for a period not less than one year. He was met by the defense that his oral contract was absolutely void under the state Statute of Frauds.[4] The court held (five to four) that a contract valid under the maritime law cannot be affected by a state statute and allowed recovery.

The decision at once raises the fundamental question, what is the maritime law? This is said to be the general system of maritime law which was familiar to lawyers and statesmen of the country when the Constitution was adopted.[5] To determine the

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[1] U. S. Const., Art. III, §2.

[2] Judicial Code, § 24, cl. 3, and since 1917, by the Johnson Amendment "to all claimants the rights and remedies under the Workmen's Compensation law of any state."

[3] (1919) 248 U. S. 309, 63 L. Ed., Adv. Op. 143, 39 Sup. Ct. Rep. 112. Annotated in 28 Yale Law Journal, 500 and 17 Michigan Law Review 591.

[4] Cal. Civ. Code, § 1624. This contention is in fact incorrect, as the California Statute of Frauds is procedural only and is waived unless particularly pleaded, or unless objection is taken to the evidence. Walberg v. Underwood (1919) 28 Cal. App. Dec. 351, 180 Pac. 55; Nunez v. Morgan (1888) 77 Cal. 427, 19 Pac. 753. The principal case might properly have turned on the rule that the admiralty courts are not bound to follow state statutes of procedure. The Key City (1871) 14 Wall. 653, 20 L. Ed. 896. The Supreme Court did not consider this point, but assumed that the contract was absolutely void by state law.

[5] The Lottawanna (1874) 21 Wall. 558, 22 L. Ed. 654.

extent of this law we must look to our legal history, constitution, legislation, usages and decisions of the courts, and when these fail, to the principles by which they have been governed.[6] The federal courts recognize in the general maritime law of Western Europe, the ancient codes and compilations and the rules of the English Admiralty the source and origin of our own sea-law. The rules of this so-called general maritime law are not binding on our courts as law, but they furnish the principles and theories upon which cases may be reasoned and decided.[7]

It is clear that no power is expressly granted, nor expressly denied, the federal government by the Constitution to legislate in matters affecting the general maritime law. Its power to change or supplement this law is an implied power—implied from the grant of admiralty jurisdiction to the federal courts,[8] and implied from the general purposes for which it was granted, namely, to secure uniformity[9] and to reserve for the national judiciary questions affecting the rights of foreigners and intercourse with foreign states.[10] Upon this base of inference has been erected the modern rule of the Supreme Court, expressed in Southern Pacific Co. v. Jensen,[11] that no state legislation "is valid if it contravenes the essential purposes expressed by an Act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations."

The history of this rule properly begins with The Lottawanna.[12] Then came In re Garnett,[13] holding that the power to change the maritime law was exclusively in Congress and not in the state legislatures. This was followed by The J. E. Rumbell,[14] holding that no state legislation can bring within the admiralty jurisdiction of the national courts a subject not maritime in its nature. The Glide[15] sustained the older cases of Hind v. Trevor,[16] and The Moses Taylor,[17] and held that a state cannot provide for a proceeding in rem in a maritime matter in its own

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[6] The Lottawanna, supra, n. 5.

[7] The Rebecca (1831) 1 Ware (188), 187, Fed. Cas. No. 11, 619; De Lovio v. Boit (1815) 2 Gall. 398, Fed. Cas. No. 3,776; The Saturnus (1918) 250 Fed. 407.

[8] Dissenting opinion of Mr. Justice Pitney in Southern Pacific v. Jensen (1917) 244 U. S. 205, 61 L. Ed. 1086, 37 Sup. Ct. Rep. 524, Ann. Cas., 1917E, 900; L. R. A. 1918C, 451.

[9] The Lottawanna, supra, n. 5. The Federalist, No. 80 (Ford's ed., p. 535.)

[10] Story on the Constitution, (4th ed.), § 1670.

[11] Southern Pacific Co. v. Jensen, supra, n. 8.

[12] Supra, n. 5.

[13] (1890) 141 U. S. 1, 35 L. Ed. 631, 11 Sup. Ct. Rep. 840.

[14] (1892) 148 U. S. 1, 37 L. Ed. 345, 13 Sup. Ct. Rep. 498.

[15] (1897) 167 U. S. 606, 42 L. Ed. 296, 17 Sup. Ct. Rep. 930.

[16] (1866) 4 Wall. 555, 18 L. Ed. 451.

[17] (1866) 4 Wall. 411, 18 L. Ed. 397.

court. Nor can it create jurisdiction in a federal court. A state statute absolving a municipal corporation from liability for damage caused by its fire boat is void and of no effect in a proceeding in admiralty for collision of such fire boat.[18] No state can fix upon a foreign vessel a maritime lien which does not exist by the maritime law.[19] State laws cannot change the rights of seamen, nor the liability of shipowners which have been fixed by the maritime law.[20] It was early held that a state statute providing different "rules of the road" than those recognized by the maritime law is void, at least in the federal courts, as regards foreign ships in collision.[21] Once the premise of uniformity is accepted, it necessarily follows that congress alone has power co-terminous with the admiralty and maritime jurisdiction,because otherwise we would be bound forever by ancient and unchangeable rules of maritime law—a situation absurd on its face.

The logical consequence of this history was the Jensen case and the rule above set out. This was followed in Chelentis v. Luckenback Steamship Company,[22] holding that even in a state court the rules of the maritime law regarding sailor's rights must be followed and that they cannot be changed by state legislation. Union Fish Co. v. Errickson merely goes one step further and says that if a contract is maritime, no state law can make it invalid or affect it in the slightest degree.

The other side of this story is to be found in the decisions of the state courts, of which California is a good example. The sections of the Practice Act providing for actions against vessels were early thought to confer jurisdiction in admiralty in the state courts.[23] Under this statute it was held that service of process upon the owner of a ship was equivalent to its seizure and that jurisdiction in rem thereupon existed against the vessel.[24] As soon as the vessel was seized a maritime lien arose in favor of the person at whose suit seizure was made.[25] The constitutionality of these sections was attacked in Taylor v. Steamer Columbia,[26] but the court sustained the statute, saying, "The States are not deprived by the Constitution of the United States of the power to confer upon their own courts all admiralty and maritime jurisdiction; consequently Congress has no power to make this jurisdiction exclusive to the Federal Courts." The

[18] Workman v. N. Y. City (1900) 179 U. S. 552, 45 L. Ed. 314, 21 Sup. Ct. Rep. 212.
[19] The Roanoke (1902) 189 U. S. 185, 47 L. Ed. 770, 23 Sup. Ct. Rep. 491, Rep. 491.
[20] Barrett v. Macomber Co. (1918) 253 Fed. 205; Rhode v. Grant Smith Porter Co. (1919) 259 Fed. 304.
[21] The New York v. Rea (1855) 18 How. 223, 15 L. Ed. 359.
[22] (1917) 247 U. S. 372, 62 L. Ed. 1171, 38 Sup. Ct. Rep. 501.
[23] Cal. Practice Act, Lit. XXVIII, ch. VI, § 317 and ff.
[24] Averill v. Steamer Hartford (1852) 2 Cal. 308.
[25] Meiggs v. Scannell (1857) 7 Cal. 405.
[26] Taylor v. Steamer Columbia (1855) 5 Cal. 268.

constitutionality of the Act was later doubted, but the earlier cases were nevertheless followed.[27]

These theories were finally overthrown by the Supreme Court in The Moses Taylor.[28] Following this decision, the Practice Act was re-drafted by Justice Field.[29] However, it has again been held unconstitutional, as permitting an action in rem in a state court, although this holding was perhaps not necessary to the decision.[30]

Nevertheless, in at least three distinct classes of cases, state legislation modifying the general maritime law has been sustained.

(1) A state statute might (before the Federal Lien Act of 1910) create a maritime lien for repairs or supplies on a domestic vessel in her home port and such lien will be enforced in rem in the federal courts.[31] Such statutes have been explained on three grounds: (a) that it is historical. Colonial courts were accustomed to such liens, in contradistinction to the practice in England where, as a result of the conflict between the admiralty and common law jurisdictions, no maritime lien was permitted unless it arose on the high seas;[32] our courts refused to be bound by the narrow English view of the admiralty jurisdiction; (b) that it is a mere rule of presumption. The general maritime law gives a lien for supplies furnished to a foreign vessel in a foreign port, because the ship is presumed to be tacitly hypothecated for the debt.[33] But this inference is rebutted by the presumption that supplies were furnished on the credit of the owner if the vessel is in her home port;[34] (c) that it is anomalous.[35]

(2) A statute may create a lien upon a ship for death by wrongful act enforceable in rem in the admiralty court.[36] This is said to be based on the power of the states to enact statutes creating rights and imposing obligations concerning subjects within

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[27] Warner v. Uncle Sam (1858) 9 Cal. 697; Ord v. Uncle Sam (1859) 13 Cal. 369.

[28] Supra, n. 17.

[29] Olsen v. Birch & Co. (1901) 133 Cal. 479, 65 Pac. 1032, 85 Am. St. Rep. 215.

[30] Stephens v. Weyl-Zuckerman Co. (1917) 34 Cal. App. 210, 167 Pac. 171; the point for which the case really stands is that all state laws regarding maritime liens are superseded by the Federal Maritime Lien Law of 1910. Act of June 23, 1910; 36 U. S. Stats. at L. 604; 9 Fed. Stats. Ann. (2nd ed.) 346.

[31] The General Smith (1819) 4 Wheat. 438, 4 L. Ed. 609; The Glide, supra, n. 15.

[32] The General Burnside (1880) 3 Fed. 228.

[33] The Kalorama (1869) 10 Wall. 204, 19 L. Ed. 941; The Grapeshot (1869) 9 Wall. 129, 19 L. Ed. 651; The Virgin (1834) 8 Pet. 538, 8 L. Ed. 1036; Thomas v. Osborn (1856) 19 How. 22, 15 L. Ed. 534; The Lulu (1869) 10 Wall. 192, 19 L. Ed. 906.

[34] The St. Iago de Cuba (1824) 9 Wheat. 409, 416, 6 L. Ed. 122; The Valencia (1896) 165 U. S. 264, 271, 41 L. Ed. 710, 17 Sup. Ct. Rep. 323.

[35] The Lottawanna, supra, n. 5.

[36] The Hamilton (1907) 207 U. S. 398, 52 L. Ed. 264, 28 Sup. Ct. Rep. 133; The Oregon (1891) 45 Fed. 62.

the domain of the paramount authority of congress to legislate, so long as congressional authority remains dormant by reason of failure to enact any statute relating to the same subject.[37]

(3) State pilotage laws are valid. Their validity has not been tested by their relation to the grant of admiralty jurisdiction to the federal courts, but by the construction of the commerce clause. Here the rule is well settled that jurisdiction remains in the state until congress has acted inconsistently with the state statutes.[38]

An examination of the grounds upon which state legislation in regard to the maritime law has been supported furnishes no assurance that such legislation will be permitted to continue. Obviously it cannot be sustained as a historical incident, nor as an anomaly, nor upon the false analogy of similar legislation in matters concerning interstate commerce, for not all matters of a maritime nature fall within the commerce clause.[39] The commerce clause is not concurrent with the maritime law, the power to modify which is vested exclusively in congress, and the jurisdiction over which is vested exclusively in the federal courts, saving to suitors the right of a common law remedy where the common law is competent to give it.

It is submitted that the Errickson case is right and is but the logical application of the rule in the Jensen case stated above. If a state law in contravention to a rule of the admiralty and maritime law holding an oral contract valid is to that extent void, then no state law can be applied to determine the validity of an accepted maritime contract. To determine the validity of maritime contracts by the maritime law means simply that admiralty courts will follow their own eclectic maritime law, similar sometimes to the common law and sometimes differing, but will not be bound either by state common law or by state statutes. If the federal courts were compelled to adopt the common law rules of the states wherein they are sitting, it would seem that the uniformity of the law which the above decisions insist upon could not be obtained.

It is this precise point, however, which raises many new questions. The maritime law is in some respects incomplete. From the standpoint of the states the question is immediately raised as to the status of their statutes regarding marine insurance, bills of lading, and other contracts of a maritime character. The logical result of Union Fish Co. v. Errickson, and Southern Pacific Co. v. Jensen, however revolutionary it may seem, is that many of these statutes must go into the discard.

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[37] Sherlock v. Alling (1876) 93 U. S. 99, 23 L. Ed. 819; Aurora Shipping Co. v. Boyce (1911) 191 Fed. 960.

[38] Cooley v. Port Wardens (1851) 12 How. 299, 13 L. Ed. 996; Ex parte McNiel (1871) 13 Wall. 236, 20 L. Ed. 624.

[39] Cf. in re Garnett, supra, n. 13.

At least two points seem now to be definitely settled:

(1) State statutes in contravention of the maritime law are void.

(2) The ultimate power to modify the maritime law resides in the federal government.

G. H.

CONTRACTS: ASSIGNMENT: LIABILITY OF ASSIGNEE TO CREDITOR.—In *Beazley v. Embree*,[1] a vendor agreed to sell land and the vendee to pay for it in ten installments. The vendee paid one installment, took possession and transferred his right, title and interest. The transferee or assignee took possession, paid three installments and then defaulted. The vendor sued the vendee and his assignee for the next installment when it fell due. A judgment against both was reversed as to the assignee. Yet in Robinson v. Rispin[2] a judgment against the assignee was sustained on the following facts. Robinson agreed to drill oil wells for Rispin, the latter to pay an agreed price and furnish casing, water, etc. Rispin assigned the contract. Robinson did a portion of the work, but as casing and water were not furnished, he stopped drilling, sued and recovered damages against the assignee. The court in the principal case attempted to distinguish Robinson v. Rispin on the ground that in the latter the executory contract had been completely performed and the benefit received. This is clearly erroneous. In both cases the plaintiff had only partially performed; in both cases the assignee had received the benefit of the partial performance.

If the two cases can not be reconciled, which is correct? Why should the assignee not be liable? The answer of the court is that the "Appellant had made no contract obligating himself to pay the plantiff—no privity existed, hence no right to recover."

How much validity is there in this requirement of privity? Take the simple case of an executory contract of sale, where the buyer assigns the contract. If the seller fails to perform, can the assignee sue? There was a time when he could not. Why? Because there was no privity. The seller had never agreed to deliver to the assignee. It is unnecessary to trace the steps by which the assignee has acquired the right to enforce the contract. It is sufficient to say that after the assignee has given notice, he has every right, privilege, power and immunity that his assignor formerly had. So far as the rights of the

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[1] (June 23, 1919) 29 Cal. App. Dec. 15.

[2] (1917) 33 Cal. App. 536, 165 Pac. 979. See also Gribling v. Bohan (1915) 26 Cal. App. 771, 148 Pac. 530; McCarty v. Owens (1895) 5 Cal. Unrep. Cas. 153, 41 Pac. 861; Wightman v. Spofford (1881) 56 Ia. 145, 8 N. W. 680.